

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CHERYL BOOKER et al.,

Plaintiffs and Respondents,

v.

IMERYS TALC AMERICA, INC. et
al.,

Defendants and Appellants.

A153835

(Alameda County
Super. Ct. No. RG15796166)

For decades, plaintiff Richard Booker worked for a paint manufacturer mixing talc and paint. After being diagnosed with mesothelioma in 2015, Booker and his wife filed an action for personal injury and loss of consortium against several entities including Imerys Talc America, Inc. (Imerys), alleging that Booker’s illness was caused by occupational exposure to asbestos-contaminated talc supplied by Imerys’s predecessor, Cyprus Mines (Cyprus). The trial court found that Imerys had contractually assumed liability for injuries caused by Cyprus’s talc products, and a jury found Imerys to be 40 percent at fault for Booker’s illness.

On appeal, Imerys argues (1) the evidence was insufficient as a matter of law to prove that Booker was exposed to asbestos-contaminated Cyprus talc; (2) the trial court erred in refusing to list additional tortfeasors and “others” on the special verdict form; and (3) the trial court erred in finding

that Imerys had assumed liability for injuries caused by Cyprus's pre-1992 talc sales. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

Booker worked for Dexter Midland Chemical Company (Dexter) in Hayward from approximately 1970 to 1992. Prior to this, Booker worked for various different employers, including Seal-Tuff Paint Co. (Seal-Tuff) in 1967 and Walter N Boysen Company (Boysen) in 1968 and 1969.

At Dexter, Booker worked as a “mixer” and “tinter” mixing batches of paint of various sizes, from 50 to 1,500 gallons. A key ingredient in the paint was talc, which came in 50-pound bags. A 50-gallon batch of paint used four to five bags of talc, while larger batches required a hundred bags. Workers carried the bags of talc to the lip of the mixing tank where they cut open the bags and poured the talc in while the mixing machine was moving “at a very rapid speed.” This process created a great deal of dust. Dexter employees used talcs “[e]very day,” and Booker was “in close proximity” to the mixing process on a “daily basis.”

Booker and his coworkers used batch tickets with paint ingredient codes specific to each product. P30 was the code for the talc product “C-400.” P67 was the code for the talc product “Mistron T-076” or “Mistron 76.” Both products (hereafter, C-400 and T-076) were manufactured by Imerys's predecessor, Cyprus. Cyprus sourced the talc for T-076 and C-400 from two mines located in Death Valley called Grantham and Panamint.

In 1992, Cyprus sold its talc business to Rio Tinto, Inc. (Rio Tinto). In anticipation of this sale, Cyprus transferred the talc business and assets to newly-created Cyprus Talc Corporation (CTC or Newco), which assumed

¹ Additional facts relevant to the issues on appeal are set forth in the respective parts of the Discussion below.

certain business obligations and liabilities pursuant to the “Agreement of Transfer and Assumption” (ATA), dated June 5, 1992.²

Booker was diagnosed with mesothelioma in or around August 2015. In December 2015, he and his wife Cheryl Booker brought an action for personal injury and loss of consortium against several defendants including Imerys and Vanderbilt Minerals LLC (Vanderbilt), alleging that Booker developed mesothelioma because of occupational exposure to defendants’ products from 1972 through 1993 at Dexter. After Booker died from mesothelioma in June 2016, Cheryl Booker filed an amended complaint adding wrongful death claims and additional plaintiffs, including the Bookers’ children and grandchildren.

A bench trial was held to determine whether Imerys had contractually assumed liability for injuries caused by Cyprus’s talc products. The trial court found that under the terms of the 1992 ATA, Imerys held the liabilities for Cyprus’s pre-1992 sales of talc sourced from the Grantham and Panamint mines.

The jury trial commenced in October 2017. Plaintiffs presented the testimony of four of Booker’s Dexter coworkers to establish that Booker was exposed to Cyprus’s T-076 and C-400 products.³ An animation showing the amount of dust created during the mixing process was played for the jury. Plaintiffs also presented video deposition testimony of former Cyprus president Henry Trist Mulryan, as well as documentary evidence including internal Cyprus documents and laboratory test reports, to establish that Cyprus knew the talc sourced from the Death Valley mines contained

² CTC was renamed “Luzenac America, Inc.,” which was later renamed “Imerys Talc America, Inc.”

³ The coworkers also identified other talc brands used at Dexter, including Pfizer, Whittaker Clark, and Vanderbilt’s Nyltal.

asbestos. Plaintiffs also presented the testimony of materials scientist Dr. William Longo, epidemiologist Dr. Allan Smith, pathologist Dr. Jerrold Abraham, and pulmonologist Dr. Barry Horn.

In turn, Imerys presented the testimony of oncologist Dr. Mussa Banisadre and various physicians' notes to establish that Booker's illness was caused by his exposure to "powdered asbestos" prior to his working at Dexter. Imerys also presented geologist and mineralogist Matthew Sanchez, Ph.D., who testified among other things that asbestos does not appear uniformly in talc and that studies by the United States Geological Survey of talc samples from the Death Valley region reported only sporadic asbestiform particles.

During the verdict form conference, plaintiffs objected to the inclusion of Pfizer and Whittaker Clark on the verdict form, arguing there was no evidence showing asbestos in their products. The trial court agreed and excluded those entities. Imerys and Vanderbilt asked to include Seal-Tuff and Boysen because they "fit [the] description" of Booker's employers in the 1960's or 1970's, but the trial court refused, finding defendants failed to identify any evidence of negligent conduct by Seal-Tuff and Boysen. Imerys and Vanderbilt also requested that the verdict form include reference to " 'all others,' a generic 'employers' or someone . . . so the jury can attribute fault for what Mr. Booker says, I was exposed to asbestos at one of my employers." The court denied the request because Imerys and Vanderbilt failed to identify any evidence of negligent conduct of unidentified nonparties.

The jury found Vanderbilt and Imerys liable for increasing Booker's risk of mesothelioma and awarded plaintiffs \$440,000 in economic damages and \$17,130,000 in noneconomic damages, apportioning 60 percent of the fault to Vanderbilt and 40 percent to Imerys. The jury also found that each

defendant acted with malice, fraud, or oppression.⁴ During the punitive damages phase of trial, the jury awarded \$4,600,000 in punitive damages against Imerys.

Imerys appealed the judgment.⁵

DISCUSSION

A. Substantial Evidence of Exposure and Causation

Our Supreme Court has established a two-part test to determine whether exposure to a particular product was a legal cause of a plaintiff's asbestos-related injury. "[T]he plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, *and* must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 (*Rutherford*), fn. omitted.) Imerys contends the evidence at trial was insufficient on both prongs. We address these claims in order.

1. *Exposure and Contamination*

Imerys first contends the evidence was insufficient as a matter of law to prove that Booker was more likely than not exposed to a Cyprus talc product contaminated with asbestos.

It is settled that without exposure to a defendant's product, there can be no causation of injury. (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 (*Whitmire*); *McGonnell v. Kaiser Gypsum Co.* (2002) 98 Cal.App.4th 1098, 1103 (*McGonnell*).) And as indicated, it is the plaintiff's

⁴ After the verdict, Vanderbilt and plaintiffs reached a settlement.

⁵ Imerys separately appealed from the trial court's order awarding plaintiffs their litigation costs. We affirm that order in a separate opinion filed this date (*Booker v. Imerys Talc America* (A153995) [nonpub. opn.]).

burden to establish some threshold exposure to asbestos through defendant's products. (*Rutherford, supra*, 16 Cal.4th at pp. 982–983; *Casey v. Perini Corp.* (2012) 206 Cal.App.4th 1222, 1236.) The evidence must support “an inference of *probability*” (e.g., more than a 50 percent chance) that the plaintiff was exposed to asbestos from the defendant's product. (*Johnson v. ArvinMeritor, Inc.* (2017) 9 Cal.App.5th 234, 245 (*Johnson*).)

“Plaintiffs who allege they developed mesothelioma as a result of exposure to asbestos-contaminated talcum powder products face a different challenge. . . . The material issue in a talc asbestos case is not the plaintiff's exposure to the product, but the plaintiff's exposure to asbestos through use of a talc product not designed to contain that mineral. In other words, the question is whether it is more likely than not that the talc product was contaminated with asbestos during the time the plaintiff used it.” (*LAOSD Asbestos Cases* (2020) 44 Cal.App.5th 475, 489 (*LAOSD*).) A mere possibility of exposure to asbestos-contaminated talc is insufficient. (*Berg v. Colgate-Palmolive Co.* (2019) 42 Cal.App.5th 630, 635 (*Berg*); *McGonnell, supra*, 98 Cal.App.4th at p. 1106 [speculation about exposure to asbestos product insufficient to defeat summary judgment].)

As a threshold matter, Imerys argues this appeal involves our de novo review of the pure legal question of “whether a plaintiff can satisfy the exposure element of a claim that mesothelioma was caused by talc manufactured by a specific company where there is no evidence that the talc used by the decedent was contaminated with asbestos.” We disagree, as it is simply untrue that plaintiffs submitted *no* evidence of asbestos contamination. On the contrary, as discussed more fully below, plaintiffs submitted deposition testimony and documents (including Cyprus's own

laboratory reports), which evidenced Booker's exposure to Cyprus talc products contaminated with asbestos.

At bottom, Imerys is left with challenging the sufficiency of plaintiffs' evidence of exposure and contamination. When the sufficiency of evidence is at issue, reviewing courts apply the substantial evidence standard. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.) Under this standard, "[o]ur authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment." (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630–631 (*Howard*).) "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences or deductions in the absence of a rule of law specifying the inference to be drawn." (*Howard, supra*, 72 Cal.App.4th at p. 631.) We view all factual matters in the light most favorable to the prevailing party, resolving all conflicts and indulging all reasonable inferences from the evidence to support the judgment. (*Id.* at p. 630.)

Here, there is substantial evidence in the record of Booker's daily, long-term exposure to Cyprus talc products. Coworker Robert Chavez testified that he saw Booker mixing paint and talc during the entire period of 1975 to 1993, and that he specifically saw Booker dumping bags of T-076. Coworker Barry Bromstead testified that Dexter used various talc products including Cyprus's C-400, and that he saw Booker in close proximity to the mixing of talc and paint "[o]n a daily basis." Coworker George Bailey similarly testified that he observed Booker in the early, middle, and late 1980's working with T-076 and C-400, and that he saw Booker pouring the bags of talc into the

mixing tank and creating dust.⁶ Despite Imerys’s complaint that plaintiffs did not present specific evidence of when or how many shipments of Cyprus talc products were made to Dexter during Booker’s tenure, the coworker testimony, viewed in a light most favorable to the judgment, amply established that Cyprus talc products made their way to Dexter’s Hayward facility and were used daily by Booker for years. Indeed, the ability of some coworkers to recall the Dexter codes for C-400 and T-076 supported the inference that these Cyprus products were used frequently at Dexter.

Substantial evidence also supported the jury’s finding that these Cyprus talc products were more likely than not contaminated with asbestos at the time Booker used them. (*LAOSD, supra*, 44 Cal.App.5th at p. 489.) Viewed in a light most favorable to the judgment, plaintiffs’ evidence—specifically, the deposition testimony of former Cyprus president Mulryan, internal Cyprus documents, articles written by Cyprus representatives, and Cyprus’s own laboratory reports on talcs sourced from the Death Valley mines—established the following facts.

In the 1960s, Cyprus sold “tremolitic talc products.” Cyprus’s trade name for paint talcs was “Fibrene,” e.g., “Fibrene C-400,” because these products contained “fibrous-type materials.” Cyprus’s primary source of industrial talc for paint was from “the mines around Death Valley,” and Cyprus’s “east side” Death Valley mines included Grantham and Panamint. Talc for T-076 and C-400 were sourced from Grantham and Panamint. An

⁶ Imerys argues that Bailey’s testimony was “nullified” because he thought Vanderbilt’s Nyal product was a Cyprus brand. However, credibility is irrelevant on substantial evidence review. (*Doe v. Regents of University of California* (2016) 5 Cal.App.5th 1055, 1073 (*Regents*).) In any event, Imerys makes no similar claim regarding the testimony of the other Dexter coworkers.

internal Cyprus document from 1969 referred to talc sourced from Grantham as a “hard tremolitic talc” with “25 to 5% tremolite (some anthophyllite possible).” After blending, Grantham talc had a “rather constant composition” of about “10% tremolite.”⁷

In a February 1971 article for the publication *Industrial Minerals*, Mulryan acknowledged that Cyprus’s California talcs from the mines “east” of Death Valley “often contain *significant* percentages of dolomite, calcite and tremolite.” (Italics added.)

In or around 1972, the Occupational Safety and Health Administration (OSHA) began to regulate exposure to “‘fibrous materials’” in talcs, including “tremolite.”

In a May 1972 memorandum, Mulryan informed Cyprus’s management committee that because of new regulations, “time is running out for asbestos use except where its characteristics are absolutely essential in the end product, e.g. fireproof textiles. [¶] Tremolitic talc is not essential to any of its end products and is a prime candidate for oblivion.” Mulryan identified Grantham talc as subject to regulation because it “contains up to 20% tremolite, normally 10–15%. Mulryan further stated the new regulations would “eliminate the tremolite bearing California talcs if interpreted literally.” He recommended blending Cyprus’s talcs to “reduce tremolite content to less than 2% (preferable 1%),” but the blends could include no

⁷ Materials scientist Dr. Longo testified that asbestos is “a commercial term for a type of mineral, typically classified as a magnesium silicate. And asbestos is essentially five . . . ‘commercial asbestos materials’: the serpentine, which is chrysotile; and the amphiboles, which is amosite, crocidolite, and then these accessory materials of tremolite and anthophyllite. What makes them fairly unique as compared to a lot of minerals . . . is that they are formed in what’s known as a fibrous habitat. So instead of just getting little pieces and particles of an ore, these are fibrous.”

more than 10 percent of Grantham talc. He also recommended using Panamint “which contains no tremolite” as the primary source for Cyprus’s California talc.

Cyprus continued to buy talc from Grantham until 1973 and eventually shifted its focus to Panamint. But contrary to Mulryan’s 1972 memorandum, he later testified in deposition that “the Panamint mine did contain tremolite.” Mulryan claimed that Cyprus was “able, by taking great care and using good eyeballs, to ensure that the areas mined exclude the tremolite. We backed that up with testing with [X-ray diffraction (XRD)] on site and then reviews of all of the lots of material made from materials from that mine at the central laboratory.” According to Mulryan, tremolite was visible to the naked eye, and an “[o]ld-time miner” showed Cyprus where the tremolite was before it “drilled that mine like a Swiss cheese.”

In 1975, Cyprus issued an “Asbestos-Talc Study” called the “Vanderbilt-Grantham Action Plan” (VGAP). The purpose of this study was to refute a claim made by Cyprus’s competitor, Vanderbilt, “that their talcs contain non-fibrous tremolite, actinolite, and anthophyllite,” which was the basis for Vanderbilt’s request for relief from the OSHA asbestos standard and Vanderbilt’s issuance of a letter of certification that its talcs were asbestos-free. Based on X-ray and microscopic analyses of various talc samples, the VGAP concluded that Vanderbilt talc products contained “substantial” amounts of “fibrous tremolite,” and that “[t]he claim by Vanderbilt that their talcs contain nonfibrous tremolite, actinolite, and anthophyllite, has been proven totally false.” The VGAP results were purportedly “undeniable

testimony to refute” Vanderbilt’s “claims of asbestos containing talcs not being hazardous due to their non-asbestiform tremolite content.”⁸

Importantly, the VGAP was not limited to Vanderbilt but included analysis of Cyprus’s “10 current production talc products” by means of XRD, transmission electron microscopy (TEM), and scanning electron microscopy (SEM). The VGAP found that “[f]our samples, all from California crude ore, were found to contain tremolite asbestos fibers,” and these samples included C-400 and T-076. “The talc products from California crudes, marketed by Cyprus Industrial Minerals and competitors, have been shown to contain fibrous tremolite *asbestos*.” (Italics added.) The VGAP concluded that “[t]hese results are in contradiction to the Certificate of Compliance letter issued by Cyprus Industrial Minerals Company.” Accordingly, the VGAP “recommended that the California talc products be deleted from the certification of compliance letter issued by Cyprus Industrial Minerals.” (Footnote omitted.)

Throughout the 1970’s and 1980’s, Cyprus continued to sell its California talcs, even while Cyprus’s own laboratory reports continued to show the presence of tremolite in samples of C-400 and T-076 sourced from Panamint.⁹

⁸ We note the full quotation states, ambiguously, that the results “refute *or substantiate* claims of asbestos containing talcs not being hazardous due to their non-asbestiform tremolite content.” (Italics added.) However, when read as a whole and in a light most favorable to judgment, the VGAP clearly attempted to refute, not support, Vanderbilt’s claims that its talcs contained harmless, nonasbestiform tremolite.

⁹ For instance, a June 1975 laboratory report found “traces of asbestos” by XRD in samples from Panamint. In September 1975, a sample of T-076 was found by XRD to contain tremolite. In May 1976, a laboratory report of C-400 and another blend reported fiber content in both samples based on SEM analysis. In July 1976, a laboratory report found tremolite by XRD in

In 1979, Cyprus sent a letter to the National Institute for Occupational Safety and Health criticizing the agency's findings underlying its talc criteria. In arguing that the agency inappropriately applied certain findings to Montana talc (which Cyprus claimed was free of asbestos), Cyprus acknowledged that "*asbestos* bearing" talcs "most commonly found in New York (and some parts of California)" contain "*high* amounts of impurities such as asbestos or free silica." (Italics added.)

Meanwhile, Cyprus decided not to use OSHA's method of testing talc for asbestos by polarized light microscopy. Under Cyprus's talc-testing protocol—which was still in effect in 1991—Cyprus initially screened its talc using XRD, and if no tremolite was detected, testing would stop. If tremolite was detected, Cyprus would run two more XRD scans, and "[i]f the first XRD scan cannot be confirmed by two more XRD scans, then the analysis stops, and asbestiform minerals are reported as not detected in the talc sample lot."¹⁰ Cyprus knew, however, that XRD could not detect asbestos at levels below 0.1 or 0.2 percent. Cyprus acknowledged in the VGAP that only TEM could provide "positive and conclusive scientific evidence" of asbestos fibers in talc. And in a 1978 manuscript submitted for a workshop, Cyprus acknowledged a "major limitation[]" of XRD is that its "lower levels of

all five tested samples, including two C-400 products. An August 1976 report identified tremolite by XRD in "all samples" including multiple lots of C-400 and T-076 from Panamint. A September 1976 report found tremolite content in three lots of C-400 and one lot of T-076. In or around August 1985, Cyprus performed XRD testing on all talc lots produced at Los Angeles and found that "[a]*sbestiform* amphiboles were detected by XRD" in several lots of C-400 and T-076. (Italics added.)

¹⁰ If subsequent XRD scans confirmed the presence of asbestiform minerals, Cyprus blended the talc to lower the tremolite content below the "detectability limit."

sensitivity can allow a *large* number of *asbestos* fibers to go undetected.” (Italics added.)

In sum, plaintiffs’ evidence painted a vivid picture of Cyprus’s knowledge that talc sourced from Grantham and Panamint during the exposure period consistently contained tremolite asbestos. The jury was free to reject Mulryan’s claims that Cyprus successfully mined around tremolite in Panamint, as laboratory test results in the 1970’s and 1980’s continued to show tremolite content in talc samples sourced from that mine. Indeed, as recounted in the VGAP, in 1975, Cyprus’s C-400 and T-076 talcs sourced from Panamint were found by TEM and SEM to contain “fibrous” “tremolite asbestos fibers.” Meanwhile, Cyprus’s use of XRD to test talc allowed a “‘large’ ” number of “‘asbestos fibers’ ” to go undetected, and Cyprus’s protocol did nothing to mitigate XRD’s limitations. Combined with the testimony of several Dexter coworkers regarding the length, frequency, and nature of Booker’s exposure to Cyprus talc products, and viewed in a light most favorable to the judgment, the evidence established substantially more than the mere possibility of asbestos contamination and amply supported the requisite probability that Booker encountered Cyprus talc products contaminated with asbestos. (*Johnson, supra*, 9 Cal.App.5th at p. 245.)

Imerys dismisses the VGAP as showing only that some samples of Cyprus products contained some tremolite, which in turn contained some asbestiform tremolite. Thus, Imerys contends, the VGAP did not logically or legally establish that Booker was more likely than not exposed to asbestos from Cyprus talc at Dexter. This is especially true, Imerys insists, given Cyprus’s policy to prohibit shipment of lots containing more than 0.1 percent tremolite.

We are not persuaded. Although Imerys now claims the VGAP does not logically support a finding of asbestos contamination, the record reflects that Imerys's predecessor took the opposite position in 1975 when attempting to use the VGAP to dispute Vanderbilt's claim that its talcs contained harmless, nonasbestiform tremolite. The VGAP drew its conclusions about the tremolite asbestos content of Vanderbilt's and Cyprus's talc products from analyses of talc samples, and went so far as to recommend that Cyprus's California talc products be deleted from its certification of compliance letter based on the test results. Imerys's corporate representative, Patrick Downey, testified he did not know of any Cyprus documents from the 1970's or 1980's finding the results of the VGAP summary were incorrect.

The VGAP was not the only evidence supporting the finding of asbestos contamination. As discussed, the jury could reasonably conclude from Cyprus's own laboratory test results and its statements in the documentary record that C-400 and T-076 consistently contained tremolite asbestos. And Cyprus's policy to prohibit shipments containing more than 0.1 percent tremolite might have been viewed skeptically in light of the evidence that Cyprus's talc-testing protocol allowed talc products to be sold after just one negative screening by a method likely to under-detect asbestos.

Imerys points to Dr. Sanchez's testimony that asbestos does not appear uniformly in talc, and that individual deposits in the Death Valley region vary greatly and include rocks composed primarily of tremolite, rocks with only a small amount of tremolite, and sometimes all talc with hardly any tremolite. From this, Imerys contends the presence of asbestos in some of the samples analyzed by Cyprus does not establish a probability that the particular Cyprus products at Dexter were contaminated with *asbestiform* tremolite.

Again, we are not persuaded. On substantial evidence review, we disregard evidence that does not support the judgment. (*Regents, supra*, 5 Cal.App.5th at p. 1074.) The jury was free to reject Dr. Sanchez’s testimony regarding the nonuniformity of asbestiform tremolite content found naturally in talc deposits, particularly in light of the evidence indicating that Cyprus blended its talcs with potentially up to 10 percent of Grantham-sourced talc (which itself had a “constant composition” of about 10 percent tremolite). Likewise, the jury could instead credit the VGAP and other documentary evidence pointing more specifically to tremolite in Cyprus’s own tested samples of C-400 and T-076. Importantly, Cyprus did not distinguish between asbestiform and nonasbestiform tremolite in the VGAP, its own laboratory results, or when discussing tremolite in the Death Valley mines, despite having the clear incentive to do so if it could.

On this score, Imerys argues that the VGAP and other documents cannot be construed as admissions by Cyprus that its products contained asbestos because in the 1970’s, OSHA used an “incorrect” definition of asbestos that failed to distinguish between asbestiform and nonasbestiform tremolite. Imerys claims the pre-1992 standard was “scientifically rejected” and “rescinded” after OSHA directed that nonasbestiform tremolite was “no longer” covered by the standard for asbestos.

Again, on substantial evidence review, Imerys’s evidence countering the jury’s verdict must be disregarded. (*Regents, supra*, 5 Cal.App.5th at p. 1074.) In any event, the cited portions of the witness testimony do not substantiate Imerys’s contentions that OSHA failed to distinguish between asbestiform and nonasbestiform tremolite in the 1970’s, or that the agency rescinded its pre-1992 asbestos standard because it improperly encompassed nonasbestiform tremolite. While Downey generally referred to reports from

the United States Bureau of Mines and others that the OSHA definition of a regulatory fiber was “not correct,” he did not elaborate on the reports or testify that OSHA’s earlier standard encompassed nonasbestiform tremolite. Moreover, the cited portions of Dr. Sanchez’s testimony relate only to his opinion that, assuming certain measurement criteria for identifying asbestos in talc, such criteria would not allow for an accurate determination of whether a fiber was asbestos.¹¹

The only document cited by Imerys on this issue—a 1974 Safety & Health Bulletin by the National Paint & Coatings Association—explained that “clarification . . . was obtained *from OSHA*” (italics added) that talc manufacturers were permitted to certify to their customers that their talcs were free of asbestos if they had “scientific evidence” the products did not contain “fibrous asbestiform tremolite.” This document suggests the opposite of what Imerys asserts on appeal, namely, that in 1974, OSHA did not consider nonfibrous, nonasbestiform tremolite as covered by the standard for asbestos, and that talc manufacturers like Cyprus were made aware of this clarification by OSHA itself. Accordingly, the jury could reasonably infer that Cyprus, in thereafter admitting the tremolite *asbestos* content of its talcs, lacked a basis to conclude it was nonasbestiform.

¹¹ Though not cited by Imerys, Dr. Sanchez did testify that after OSHA issued its regulation in 1972, the agency “continued to give different guidance through the years,” and that in 1992, OSHA “deregulated the nonasbestiform varieties” of tremolite. Again however, the jury was free to disregard that testimony, as Dr. Sanchez provided no further explanation for his statements and did not identify what “different guidance” OSHA provided over the years. Additionally, when cross-examined about OSHA’s regulation of asbestos from 1972 to 1992, Dr. Sanchez admitted he was not a regulatory expert and did not “know the whole history” or “the whole picture” and did not know “the complexities of that interaction over time.”

Imerys argues this case is similar to the following decisions which rejected various plaintiffs' asbestos claims. In *Collin v. CalPortland Co.* (2014) 228 Cal.App.4th 582 (*Collin*), one of the defendants manufactured a cement product that contained asbestos and another cement product that did not, but there was no evidence the plaintiff used the asbestos-containing cement. (*Id.* at p. 590.) As for the other defendant, the plaintiff admitted in discovery to having no knowledge of any evidence that could prove his exposure to that defendant's asbestos-containing product. (*Id.* at p. 594.) In *Johnson, supra*, 9 Cal.App.5th 234, the plaintiff sued three automotive parts manufacturers for his exposure to asbestos-containing brake dust that allegedly occurred when he was helping his father remove and install brakes on trucks (*id.* at pp. 236–237), but there was no evidence the brake linings his father actually handled were more likely than not supplied by one of the defendants (*id.* at pp. 244–245). In *McGonnell, supra*, 98 Cal.App.4th 1098, the decedent was allegedly exposed to the defendants' asbestos-containing cement products while working at a medical complex for many years (*id.* at p. 1101), but the plaintiffs' evidence required speculation to conclude the decedent actually encountered those products (*id.* at pp. 1102, 1105) and there was “no evidence” such products contained asbestos at the time of the alleged use (*id.* at p. 1105, italics added). Finally, in *Whitmire, supra*, 184 Cal.App.4th 1078, the plaintiffs' claim for the decedent's alleged exposure to asbestos-containing insulation in buildings constructed by the defendants failed because, even assuming the plaintiffs could prove the defendants were the contractors where the decedent worked, there was no evidence that the subject insulation contained asbestos and no evidence that any exposure of the decedent to asbestos was a substantial factor in causing the decedent's illness. (*Id.* at p. 1093.)

Those decisions are plainly distinguishable and offer no parallel to the situation here. As indicated, plaintiffs presented substantial evidence of Booker's daily, significant, and long-term exposure to Cyprus's C-400 and T-076 products. And unlike the evidence-bereft records in *McGonnell* and *Whitmire*, Cyprus's own testing, writings, and internal documents during the exposure period amply supported the finding that the particular Cyprus products used by Booker at Dexter were likely contaminated by asbestos.

In its reply brief, Imerys cites two talc-asbestos cases published after the filing of its opening brief: *Berg, supra*, 42 Cal.App.5th 630 and *LAOSD, supra*, 44 Cal.App.5th 475. Those authorities are similarly unavailing.

In *Berg*, the plaintiff claimed he was exposed to asbestos from “a total of four to six containers” of the defendant's shave talc between the years 1959 and 1961 or 1962. (*Berg, supra*, 42 Cal.App.5th at p. 632.) There, the plaintiff's evidence included the expert declaration of geologist Sean Fitzgerald, who discussed the North Carolina and Italy mines from which the defendant's talc was sourced, the results of Food and Drug Administration testing on the defendant's shave talc performed in 1972 and 1976, and the results of Fitzgerald's own tests performed in 2016 and 2018. (*Id.* at pp. 632–633.) Affirming summary judgment for the defendant, *Berg* determined that, even assuming some talc from the North Carolina and Italy mines contained some level of asbestos, Fitzgerald's declaration failed to show that all or most of the defendant's shave talc containers sold from 1959 to 1962 contained asbestos (*id.* at p. 636) and the testing Fitzgerald relied on “occurred decades after the period of Berg's use” (*id.* at pp. 636–637).

The instant matter bears no factual resemblance to *Berg*. Unlike Berg's comparatively limited exposure to the defendant's shave talc over a two- or three-year period, Booker was exposed daily to large bags of Cyprus

talc for more than two decades in a process that created large amounts of dust. And unlike Berg’s testing evidence, which post-dated the exposure period, plaintiffs here relied on Cyprus’s laboratory reports that substantially overlapped with the exposure period and indicated the consistent presence of tremolite asbestos in samples of the same talc products Booker was using at Dexter.

Finally, Imerys relies on *LAOSD*, *supra*, 44 Cal.App.5th 475, for the proposition that plaintiffs should not have prevailed without producing an expert witness to explain the specific geological or mineralogical characteristics of the Death Valley mines and to establish, through an analysis of Cyprus samples,¹² the percentage of Cyprus talc purportedly contaminated with asbestos and the levels of Cyprus talc asbestos to which Booker might have been exposed.

LAOSD is procedurally distinguishable as an appeal from a summary judgment where the defendant had carried its initial burden by submitting an expert declaration establishing that its talc and source mines did not contain asbestos.¹³ Accordingly, we do not read *LAOSD* as requiring an expert’s analysis of a defendant’s talc product at trial during the plaintiff’s case-in-chief in order to prove exposure to asbestos-contaminated talc. Here,

¹² Though notably, Dr. Sanchez testified that “there were no samples relative to this case to test.”

¹³ The plaintiffs in *LAOSD* did not submit an expert declaration in opposition to the summary judgment motion, prompting the appellate court to observe that “[t]o date, no reviewing court has held a talc asbestos plaintiff has raised a triable issue of material fact on the exposure and contamination issue without expert testimony.” (*LAOSD*, *supra*, 44 Cal.App.5th at pp. 483, 489.) In so observing, the *LAOSD* court found instructive two cases from this district, *Lyons v. Colgate-Palmolive Co.* (2017) 16 Cal.App.5th 463 and *Berg*, *supra*, 42 Cal.App.5th 630, both summary judgment appeals.

the documentary evidence at trial—including Cyprus’s own writings, internal documents, and laboratory reports—showed that Cyprus had essentially admitted the presence of tremolite asbestos in the talc it sourced from the Death Valley mines during the exposure period. Nothing in *LAOSD* invalidates such an evidentiary showing, which a jury could reasonably interpret as an admission on the contamination issue. (*Bonebrake v. McCormick* (1950) 35 Cal.2d 16, 19 [admission is “positive evidence . . . which tends to prove the truth of the matter admitted”].)¹⁴

LAOSD is also factually distinguishable. There, the documentary evidence did not raise a triable issue of material fact because the documents predated or postdated the exposure period and pertained to unrelated source mines. (*LAOSD, supra*, 44 Cal.App.5th at p. 494.) Here, in contrast, plaintiffs presented relevant documentary evidence showing the presence of tremolite asbestos in the identified source mines during the applicable exposure period.

For all of these reasons, we conclude substantial evidence supported the conclusion that Booker was more likely than not exposed to asbestos-contaminated Cyprus talc.

2. Substantial Factor/Reasonable Medical Probability

As Imerys correctly observes, plaintiffs also had to establish to a reasonable medical probability that Booker’s exposure to Cyprus’s asbestos-

¹⁴ *LAOSD* expressly did not reach the question of whether an expert declaration would be required to oppose summary judgment where there are “verified admissions or discovery answers by a talc manufacturer that might obviate the need for an opposing expert declaration” or where “the manufacturer’s counsel has conceded contamination of its products.” (*LAOSD, supra*, 44 Cal.App.5th at p. 489, fn. 12.)

contaminated products was a substantial factor in bringing about his illness. (*Rutherford, supra*, 16 Cal.4th at pp. 982–983.)

“The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.” (*Rutherford, supra*, 16 Cal.4th at p. 978.) “Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [the plaintiff].” (*Weber v. John Crane* (2006) 143 Cal.App.4th 1433, 1438.)

We conclude substantial evidence supported a reasonable medical probability of causation. As discussed, the coworker testimony established that Booker was exposed to Cyprus talc products significantly and regularly for over two decades. Dr. Horn testified that if Cyprus’s C-400 and T-076 products had asbestos in them, “exposure to the talc was responsible for [Booker] developing mesothelioma and resulting in his death.” Dr. Smith likewise testified it was “straightforward” that all types of asbestos fiber contributed to Booker’s mesothelioma. Dr. Abraham testified that he found tremolite asbestos and talc in Booker’s lung pathology, and that Booker’s cumulative exposure to asbestos throughout his life increased his risk of mesothelioma. This evidence was sufficient for the jury to conclude that Booker’s exposure to Cyprus talc was more than a negligible or theoretical contribution to his injury. (*Rutherford, supra*, 16 Cal.4th at p. 978.)

In short, there was substantial evidence from which the jury could find, without speculating, that Booker was more likely than not exposed to Cyprus talc products contaminated with asbestos, and that this exposure was, to a reasonable medical probability, a substantial factor in increasing his risk of developing mesothelioma.

B. Special Verdict Form

Imerys argues the trial court erred in refusing to list additional entities in the special verdict form for purposes of allocating fault. According to Imerys, the verdict form should have included references to: (1) Pfizer and Whittaker Clark, because their talc products were also used at Dexter; (2) Seal-Tuff and Boysen, because Booker's report to Dr. Banisadre that he worked with "powdered asbestos" was likely in regards to his pre-Dexter employment; and (3) "other" unidentified nonparties, because Booker's reference to "powdered asbestos" likely meant he was exposed to "raw" asbestos, an inherently dangerous product for which the manufacturers or suppliers would be strictly liable.

A defendant has the right under Civil Code section 1431.2, subdivision (a), to seek allocation of fault to all responsible entities, including nonparties. (*DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603.) In all cases in which more than one negligent actor jointly caused the plaintiff's injury, the jury should be instructed that liability must be apportioned to each actor who caused the harm in direct proportion to their respective fault, whether each acted intentionally or negligently or was strictly liable. (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 151.) The defendant has the burden of establishing the percentage of fault properly attributable to others. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285.) We review the correctness of a special verdict as a matter of law. (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 366 (*Wilson*).)

We conclude Pfizer and Whittaker Clark were properly excluded from the verdict form because there was no substantial evidence that Booker was exposed to their asbestos-contaminated products. (See *Wilson, supra*, 105 Cal.App.4th at p. 367.) While the VGAP appears to have identified two Pfizer

products that contained tremolite fibers, Imerys cites no evidence that either product was used at Dexter during the exposure period.

Seal-Tuff and Boysen were also properly excluded. Imerys correctly notes certain evidence indicated Booker reported to Dr. Banisadre that in the “1970’s,” he made “industrial paint for about three or four years and that involved using powdered asbestos and mixing it with paint.” But it is pure speculation that Booker was referring to his pre-Dexter employment, and it is equally plausible that he was speaking of his work at Dexter. Although another medical record indicated that Booker also reported “significant asbestos exposure” in the 1960’s, and Booker worked at Seal-Tuff and Boysen at various times during that decade, there was no evidence of the working conditions at Seal-Tuff or Boysen or of any purported wrongdoing on their part that might have exposed Booker to asbestos. (*Wilson, supra*, 105 Cal.App.4th at p. 369 [fault under Civil Code section 1431.2 connotes wrongdoing or culpability].) Simply put, Booker’s inconsistent reports to medical professionals of his exposure to “powdered asbestos” in the 1970’s or “asbestos” in the 1960’s did not amount to substantial evidence that Boysen and/or Seal-Tuff committed wrongdoing that increased Booker’s risk of developing mesothelioma.

Likewise, there is no evidence in the record indicating that an unidentified nonparty committed wrongdoing that increased Booker’s risk of illness. Imerys belatedly argues, for the first time on appeal, that unnamed manufacturers and suppliers of “raw” asbestos to which Booker was exposed should have been included in the verdict form because they bear strict liability for his injuries. (See *Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1187–1191 [strict products liability applies to suppliers of raw asbestos].) Although Imerys contends this claim was encompassed

within its request at trial to allocate fault to “others,” Imerys’s counsel had represented to the court that such “others” would encompass unidentified prior *employers* and made no mention of strictly liable manufacturers and suppliers. Accordingly, Imerys’s failure to raise the issue below forfeits review of the matter on appeal. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 529.)

In any event, even if the issue was not forfeited, it is meritless. The premise for Imerys’s strict products liability theory is that Booker was exposed to “raw” asbestos because he reported working with “powdered asbestos.” But the record contains no suggestion that Booker was referring to raw asbestos when he used the term “powdered asbestos.” And notably, Imerys cites no other evidence indicating that Booker was in fact exposed to raw asbestos at Dexter or elsewhere.

Accordingly, the trial court committed no error with regard to the special verdict form.

C. Assumption of Liability

Imerys contends the trial court erred in concluding that Imerys contractually assumed liability for Cyprus’s pre-1992 talc products.

A purchaser of corporate assets assumes the seller’s liabilities where “‘there is an express or implied agreement of assumption.’” (*Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust* (2002) 95 Cal.App.4th 1182, 1188.) The question of Imerys’s assumption of liabilities is based on interpretation of the 1992 ATA between Cyprus (the seller) and CTC (the buyer, which was ultimately renamed Imerys). Where, as here, the credibility of extrinsic evidence is not at issue, a reviewing court interprets the contract *de novo*. (*Sierra Vista Regional Medical Center v. Bonta* (2003) 107 Cal.App.4th 237, 245.) In ascertaining the mutual intent of the parties (see Civ. Code, § 1636),

we read the contract as a whole and interpret the words in their ordinary and popular sense (Civ. Code, §§ 1641, 1644). The contract language will govern where it is clear and explicit. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264.)

The relevant contractual language is set forth in paragraphs 2, 4, and 5 of the ATA. Paragraph 4 explicitly states that the buyer shall assume “all of the liabilities or obligations, whether known, unknown, contingent or otherwise primarily relating to the Transferred Assets, including, without limitations, liabilities and obligations, whether known, unknown, contingent or otherwise arising out of the transactions or events occurring on or prior to the Closing and relating primarily to the Transferred Assets.” Paragraph 2 defines “‘Transferred Assets’” as “all of Cyprus’ right, title and interest in and to the assets, properties, rights and businesses of every type and description used primarily in or relating to Cyprus’ talc business.” Paragraph 5, meanwhile, expressly states the ATA excludes “(i) any liabilities or obligations arising out of or relating to the Excluded Assets, (ii) any liabilities or obligations arising out of the Montana net proceeds tax liability, (iii) any liabilities arising out of or relating to properties disposed of by the Talc Business prior to the Newco Closing, and (iv) any liabilities or obligations (including costs and expenses associated therewith) arising from any litigation arising out of or relating to the operation of the businesses of the Companies prior to the Closing as to which Buyer has given written notice to Seller within one year of the Closing Date.”¹⁵

¹⁵ Subsequent amendments to the ATA replaced the word “litigation” in paragraph 5(iv) with “third party claims (other than the third party claim for which and to the extent that Cyprus and Cyprus Minerals Company are not liable to any Buyer Indemnatee under the Stock Purchase Agreement).”

Based on the clear and explicit language of the ATA, the buyer purchased Cyprus's "Transferred Assets" (including its entire talc business and all related rights thereto) and broadly assumed all liabilities "primarily relating" to those assets, whether known or unknown and without limitation, except where assets were expressly excluded.¹⁶ Liability arising from Cyprus's pre-1992 talc sales of Grantham- or Panamint-sourced talc was not expressly excluded. Nor does Imerys contend the buyer gave written notice to Cyprus within a year of the ATA's closing date seeking to exclude liabilities for any third-party claims arising out of the pre-closing operations of the talc business, as would have been required by paragraph 5(iv) of the ATA.

In arguing the ATA did not evidence Cyprus's transfer of liabilities for talc from Grantham and Panamint to the buyer, Imerys points to a Stock Purchase Agreement (SPA) which was executed the same day as the ATA and which did not include Grantham or Panamint in Cyprus's list of transferred assets. Imerys further argues that under section 5.20 of the SPA,¹⁷ the parties intended to transfer the talc business as it was then "presently conducted." Because the Grantham and Panamint operations were no longer part of Cyprus's "presently conducted" talc business on the ATA's closing

¹⁶ Pursuant to paragraph 3, entitled "Excluded Assets," the only excluded asset was "The Hamm Underground Mine Property."

¹⁷ Section 5.20, entitled "Entire Business," states: "The Companies and the European Companies conduct all of the talc business of Seller and its Affiliates and own (without any right, title or encumbrance in favor of Seller or any of its Affiliates other than the Companies) all of the assets, rights or interests relating to such business, other than Cyprus logos and the Hamm Underground Mine Property, that are owned by Seller or any of its Affiliates. The assets of the Companies as of the Closing Date will be sufficient to enable the Companies to carry out the talc business of Seller and its Affiliates as presently conducted by Seller and its Affiliates."

date, Imerys asserts the buyer did not assume any liabilities associated with those operations.

We disagree. The scope of liability assumed by the buyer was defined by paragraphs 2, 4, and 5 the ATA. As discussed, the buyer broadly assumed all known and unknown liabilities primarily relating not just to Cyprus's properties, but to the operation of its talc business. Thus, it is of no consequence that Cyprus did not list Grantham and Panamint in the SPA as transferred assets. Likewise, Imerys's "presently conducted" argument is unavailing because section 5.20 of the SPA simply reflected the seller's assurance that the assets received would be sufficient to enable the buyer to carry out the talc business as "presently conducted" on the date of closing. By its plain terms, section 5.20 did not purport to limit the nature of the business sold or the liabilities assumed to "presently conducted" operations.

We conclude the trial court correctly determined that Imerys was contractually liable for Booker's injuries.¹⁸

¹⁸ In closing, we note that Imerys raised two arguments for the first time in its reply brief and reiterated them at oral argument. First, Imerys contends it did not assume liabilities for talc sourced from Panamint because, under paragraph 5(iii) of the ATA, Panamint was a property that Cyprus "disposed of" prior to the ATA's closing date. Second Imerys argues it has no liability for talc sales from "Cyprus Industrial Minerals Corporation" (CIM Corp.) because there is no evidence that CIM Corp. (as opposed to "Cyprus Industrial Minerals Company") sold the talc that harmed Booker, and no facts supporting the piercing of CIM Corp.'s corporate veil. We decline to consider these new reply arguments. Points raised in the reply brief for the first time will generally not be considered unless good reason is shown for failure to present them before. (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115.) Imery does not explain why it could not have raised these issues in its opening brief.

DISPOSITION

The judgment is affirmed. Plaintiffs are entitled to their costs on appeal.

Fujisaki, J.

WE CONCUR:

Siggins, P.J.

Jackson, J.

A153835